

APR 18 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

SELOMI M. VILLALTA,

Plaintiff - Appellant,

v.

HOME DEPOT USA, INC.,

Defendant - Appellee.

No. 05-17137

D.C. No. CV-04-02860-CW

MEMORANDUM^{*}

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Submitted April 13, 2006^{**}

Before: SILVERMAN, McKEOWN, and PAEZ, Circuit Judges.

Selomi M. Villalta appeals pro se from the district court's summary judgment dismissing his discrimination action against Home Depot USA, Inc.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

(“Home Depot”). We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo, *Lyons v. England*, 307 F.3d 1092, 1103 (9th Cir. 2002), and we affirm.

The district court properly concluded that Villalta failed to establish a prima facie claim of discrimination on the basis of his race and national origin when he was not hired by Home Depot because the undisputed evidence shows that Villalta was not qualified for the position he sought due to a pending criminal charge. *See id.* at 1112 (a plaintiff can make out a prima facie case of discrimination by showing that (1) he belongs to a statutorily protected class; (2) he applied for and was qualified for an available position; (3) he was rejected despite his qualifications; and (4) after the rejection, the position remained available and the employer continued to review applicants possessing comparable qualifications).

Moreover, even if Villalta had established a prima facie case of discrimination, he failed to produce any evidence that Home Depot’s legitimate, non-discriminatory reason for not hiring Villalta was pretext for discrimination. *See id.*

Villalta’s remaining contentions lack merit.

AFFIRMED.